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Supreme Court of the United States

October Term, 1940

No. 251

MILLINERY CREATOR'S GUILD, INC. (Formerly MILLINERY QUALITY GUILD, INC.), DAVE HERSTEIN COMPANY, G. HOWARD HODGE, EDGAR J. LORIE, INC., L. G. MEYERSON, INC., VOGUE HAT CO., HARRY SOLOMONS and MAY F. SOLOMONS, co-partners trading as "Harry Solomons and Sons",

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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MILLINERY CREATOR'S GUILD, INC. (Formerly MILLINERY QUALITY GUILD, INC.), DAVE HERSTEIN COMPANY, G. HOWARD HODGE, EDGAR J. LORIE, INC., L. G. MEYERSON, INC., VOGUE HAT CO., HARRY SOLOMONS and MAY F. SOLOMONS, co-partners trading as "Harry Solomons and Sons",

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Millinery Creator's Guild, Inc. (formerly Millinery Quality Guild, Inc.), Dave Herstein Company, G. Howard Hodge, Edgar J. Lorie, Inc., L. G. Meyerson, Inc., Vogue Hat Co., Harry Solomons and May F. Solomons, co-partners trading as "Harry Solomons and Sons", respectfully show to the Court as follows:

Statement.

This is a petition for a writ of certiorari to review the decision and order of the Circuit Court of Appeals for the Second Circuit affirming a "cease and desist" order issued

by Federal Trade Commission and directing petitioners to cease and desist from pursuing a mutual plan, understanding or agreement to eliminate style piracy.

The judgment or decree of the Circuit Court of Appeals was entered on February 19, 1940. By order of Mr. Justice STONE of this Court, the time to file this petition for certiorari has been duly extended to and including July 18, 1940.

There were twenty-eight respondents before Federal Trade Commission. The Complaint was dismissed as against three of these. One of the respondents did not appeal to the Circuit Court. Five of the respondents are no longer in business. Eleven of the respondents are no longer associated with the Millinery Creator's Guild, and the other seven are the petitioners to this Court.

Jurisdiction.

Petitioners invoke the jurisdiction of this Court under Sections 346, 347 and 348 of the Judicial Code as amended by the Act of May 20, 1926 c. 347, sect. 13 (b) (44 Stat. 587).

The Facts.

The facts are found in a stipulation at pages 163-173 of the record, together with the evidence theretofore taken (R. pp. 162-163, fols. 486-487). Petitioners' motion to introduce further evidence was denied by the Commission (R. pp. 66-71).

It has been agreed that the testimony appearing after the stipulation was directed exclusively against parties not now before the Court and is not a part of the case against these petitioners (R. pp. 177-178, fols. 531-532).

Petitioner, Millinery Creator's Guild, Inc. (formerly Millinery Quality Guild, Inc.), and hereinafter called the Guild, is a New York stock corporation owned by certain

Parisian milliners (R. p. 163, fols. 488-489). It has, however, acted as the nucleous of a group of highest grade milliners who seek to combat style piracy (R. p. 164, fol. 490). The only restrictions on membership in the group are (1) that a member must be an originator of designs and (2) handle high grade millinery (R. pp. 148-149) (*i. e.* hats selling at over $5.00 a piece wholesale; see R. p. 167). Protection against style piracy was extended to anyone originating a design irrespective of membership in the group (R. pp. 148-149).

The style element is the most important factor in the sale of ladies' hats (R. p. 167, fol. 500). Petitioners are constantly engaged in the origination of new styles of ladies' hats (R. p. 164, fol. 491) and about 75% of the hats sold by petitioners are hats designed by the firm which sells them (R. p. 164, fol. 492). The other 25% of the hats sold by them are authorized copies of Parisian models (R. p. 164, fol. 492). Petitioners go to great expense in employing designers to create these new styles of hats and in sending these designers to Paris, France and other European cities for inspiration (R. p. 167).

As petitioners produce only highest grade hats, it must be assumed that they produce only a small fraction of the total hats produced in the United States.*

Style piracy and its effects are described by the Circuit Court of Appeals First Circuit as follows: See *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild et al.*, 90 Fed. (2d) 556, 558.

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* In a case note in the Yale Law Journal, May, 1940, page 1290, regarding the decision below, it is estimated that this percentage would not exceed 6%. This is based upon statistics found in Nienburg—"Conditions in the Millinery Industry in the United States" (U. S. Dept. Labor 1939) 21, and an article in Fortune Magazine, January, 1935, pages 50, 53, 54 entitled "$200,000,000 Worth of Hats". At page 82 of that article the writer estimates that the Guild affiliates produce only a "minute fraction" of the total hats produced in the United States.

"A manufacturer who is a copyist does not send stylists or designers to Paris for inspiration. Instead he copies original designs of other manufacturers, which is accomplished in different ways. Sometimes a copyist buys dresses from retailers who have purchased them from original creators. Sometimes employees of copyists visit the showrooms of original creators and memorize or take notes of the details of the original design there displayed. Sometimes copyists obtain sketches or photographs of successful designs of original creators from agencies which make a business of supplying such sketches and photographs. Sometimes copyists bribe employees of original creators to furnish samples of their employers' original designs or to let them see samples from which they make sketches, and occasionally the original designs are stolen from the original creators.

"Copying destroys the style value of dresses which are copied. Women will not buy dresses at a good price at one store if dresses which look about the same are offered for sale at another store at half those prices. For this reason, copying substantially reduces the number and amount of reorders which the original creators get. With this uncertainty with respect to reorders, original creators cannot afford to buy materials in large quantities as they otherwise would. This tends to increase the cost of their dresses and the prices at which they must be sold.

"Reputation for honesty, style, and service is an important asset of retailers. Copying often injures such a reputation. A customer who has bought a dress at one store and later sees a copy of it at another store at a lower price is quite likely to think that the retailer from whom she bought the dress lacks ability to select distinctive models and that she has been overcharged. Dresses are returned and customers are lost."

The purpose of the association of the Guild was to eliminate these practices from the trade and to that end, the

originators of ladies' hats, who are now before the Court, adopted the following plan:

A registration bureau was established where the originator of a design, whether or not he were a member of the Guild (R. p. 148), could register his designs (R. p. 168). Such a registration, however, was not conclusive as to originality, for in case of dispute, the matter was determined by a Board of Arbitrators (R. p. 168). While the arbitrators were originally persons connected with the Guild, petitioners suggested to the Commission a modification whereby arbitration would be before a board of independent arbitrators (R. p. 70, fols. 208-209), and this suggestion was again pressed in petitioners' briefs in the Circuit Court of Appeals.*

Having established this bureau, the Guild sought and obtained "a declaration of co-operation" from about 1600 outlets throughout the United States (R. pp. 169, 171). This declaration is found at pages 270-271 of the record. Briefly, it states that the firm signing the declaration believes that the elimination of "Style Piracy" will be beneficial to those engaged in the industry and to the public, and that accordingly, the firm signing the declaration will co-operate with the Guild by not dealing in copies of pirated styles and by reserving the right to return to the manufacturers all goods which are pirated.

Petitioners then dealt exclusively with outlets which would agree to so co-operate, and no firm which wilfully violated the tenets of the Guild with regard to "Style

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* As the plan was identical with that of Fashion Originators' Guild of America, I. . except as to the personnel of the board of arbitration, Millinery Creator's Guild offered to adopt the method of selecting arbitrators employed by Fashion Originators' Guild and approved by the Circuit Court of Appeals, First Circuit, in *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc., et al.*, 90 Fed. 2nd 556, affg. 14 F. Supp. 353.

Piracy" was allowed to remain a member of the group (R. pp. 170-171).

The Federal Trade Commission, and the Circuit Court of Appeals, Second Circuit, have held that co-operation to eliminate "Style Piracy" constitutes "unfair methods of competition" within the meaning of Section 5 of the Federal Trade Commission Act (15 U. S. C. A., Sec. 45) in that it is said to violate the Sherman Anti-Trust Act (15 U. S. C. A., Secs. 1 and 2)." The Commission has, accordingly, entered a sweeping "cease and desist" order which prohibits both the operation of this plan and any other similar methods of co-operation by Guild members to eliminate "Style Piracy" (R. pp. 62-65); and this has been affirmed by the Circuit Court of Appeals, Second Circuit (109 Fed. (2d) 175) with opinion by CLARK, J.

Questions Involved.

The sole questions involved are:

(1) Whether or not the particular methods of eliminating "Style Piracy" adopted by petitioners are "unfair methods of competition" within the meaning of Section 5 of the Federal Trade Commission Act (15 U. S. C. A. Sec. 45).

(2) Whether or not any voluntary co-operation to eliminate "Style Piracy" would constitute unfair competition within the meaning of Section 5 of the Federal Trade Commission Act (15 U. S. C. A. Sec. 45).

(3) These questions bring up the collateral question of whether or not the methods adopted by petitioners or any other methods that they might adopt to eliminate "Style Piracy" constitute a violation of the Sherman Anti-Trust Act (15 U. S. C. A. Secs. 1 and 2).

Reasons for Granting the Writ.

(1) The decision herein is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc., et al.*, 90 Fed. (2d) 556. In that case, Fashion Originators' Guild was using the same method of combating "Style Piracy" as was used by Millinery Creator's Guild in the case at hand. Wm. Filene's Sons Co. sought to enjoin this as a violation of the Sherman Anti-Trust Act (15 U. S. C. A. Secs. 1 and 2). The District Court for the District of Massachusetts entered a decree in favor of defendant with opinion by BREWSTER, J. (14 F. Supp. 353), which was affirmed by the Circuit Court of Appeals, First Circuit, with opinion by WILSON, J. (90 Fed. (2d) 556).

As the same facts in the one case have been held to violate the Sherman Anti-Trust Act, and in the other case not to violate the Sherman Anti-Trust Act, the two cases defy reconciliation. This has been recognized by the Bar at large. See 49 Yale Law Journal 1290, 1294-1295 and XX Boston Law Review 365 reprinted and commented on editorially in New York Law Journal for May 4 and 6, 1940.

The conflict is further brought out by the fact that Federal Trade Commission has entered a "cease and desist" order against Fashion Originators' Guild of America, Inc. An appeal from the "cease and desist" order in that case has been heard by the Circuit Court of Appeals, Second Circuit, and the decision thereon may be expected shortly.

(2) It is also respectfully submitted that the decision of the Circuit Court of Appeals, Second Circuit, in the case at hand is in conflict with two prior decisions of this Court. In

Appalachian Coals, Inc. v. *U. S.*, 288 U. S. 344, it was held that co-operative effort to eliminate trade abuses where reasonably directed to that purpose, is not a violation of the Sherman Anti-Trust Act; and in *International News Service* v. *Associated Press*, 248 U. S. 215, it was held that the creative effort in gathering and reporting news would be protected from copyists.

(3) It is also respectfully submitted that the question considered by the Circuit Court of Appeals of the Second Circuit in this case and by the Circuit Court of Appeals for the First Circuit in *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc., et al.*, 90 Fed. (2d) 556, is an important question under Federal law which, unless the same can be considered to have been decided in petitioners' favor by this Court in the above mentioned cases, has not been and should be settled by this Court.

(4) Finally, we submit that the question presented is of great public interest and importance, affecting vitally a num- of large industries in the United States and the purchasing public at large.

WHEREFORE your petitioners respectfully pray that writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding such Cou t to certify and send to this Court on a day designated for its review and determination, a full and complete transcript of the records and proceedings in said United States Circuit Court of Appeals, had in said proceedings entitled in that Court, "Millinery Creator's Guild, Inc. (formerly Millinery Quality Guild, Inc.), Dave Herstein Company, Farrington & Evans Inc., Cooper & Russell Inc., G. Howard Hodge, Edgar J. Lorie, Inc., L. G. Meyerson, Inc., Scherman

Hat Company, Oriole Hat Company, John Trinner, Inc., Vibo Company, Inc., Vogue Hat Co., Simon Millinery Company, Gladys & Belle, Inc., Hatnegie Hats, Inc., Jay-Thorpe, Inc., John Fredericks, Inc., Minnie Kramer, Inc., Nicole de Paris, Inc., Florence Reichman, Inc., Marion Valle, Inc., Sergin F. Victor, an individual trading as "Serge"; Pauline Kahn, an individual trading as "Mme. Pauline"; Harry Solomons and May F. Solomons, co-partners trading as "Harry Solomons and Sons", Petitioners, vs. Federal Trade Commission, Respondent, to the end that this cause may be reviewed and determined by this Court as provided by law and that the said order of the United States Circuit Court of Appeals for the Second Circuit herein may be reversed or modified, and that your petitioners may have such other and further relief as may be just.

MILLINERY CREATOR'S GUILD, INC. (formerly Millinery Quality Guild, Inc.), DAVE HERSTEIN COMPANY, G. HOWARD HODGE, EDGAR J. LORIE, INC., L. G. MEYERSON, INC., VOGUE HAT CO.; HARRY SOLOMONS and MAY F. SOLOMONS, co-partners trading as "Harry Solomons and Sons", *Petitioners,*

By MILLINERY CREATOR'S GUILD, INC.
A Petitioner,

By N. J. GARFUNKEL,
Vice Chairman.

Sgd Francis P Duracell

Counsel to Petitioners.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

N. J. GARFUNKEL, being duly sworn, deposes and says: That he is Vice Chairman of Millinery Creator's Guild, Inc., one of the petitioners in this application for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that this petition is made in good faith and not for the purpose of delay.

N. J. GARFUNKEL

Subscribed and sworn to before me this 15 day of July, 1940.

SAMUEL BONDY
Notary Public, Kings County
Clks. No. 62 Reg. No. 2081
N. Y. Co. Clk's No. 120
Reg. No. 2B 158
Commission expires March 30, 1942

(SEAL)

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have examined the foregoing petition for writ of certiorari; that in my opinion said petition is well-founded in law and that the said writs should be issued by this Court.

Sgd Francis L Russell

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

An opinion was written by CLARK, J., for the Circuit Court of Appeals, Second Circuit. This opinion is found in the supplemental record of proceedings in the Circuit Court and is reported at 109 Fed. (2d) 175.

Statement of Facts.

The statement of facts and questions presented appear in the petition.

Specifications of Errors to be Urged.

We submit that the Circuit Court of Appeals erred:

(1) By affirming the "cease and desist" order of Federal Trade Commission.

(2) By affirming the finding of Federal Trade Commission that petitioners' plan constituted an undue restraint of trade and a monopoly within the meaning of these terms as used in the Sherman Anti-Trust Act (15 U. S. C. A. Secs. 1 and 2).

(3) By finding that "Style Piracy" is a socially desirable form of competition.

ARGUMENT.

I.

"Style Piracy" is a social evil and has been so regarded by this Court and other courts both state and federal.

The Court below has held that "Style Piracy" is an evil which the law, nevertheless, recognizes as a socially desirable form of competition. The Circuit Court of Appeals

for the First Circuit has, however, held that "Style Piracy" is not only an evil but is a socially undesirable form of competition (*Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc., et al.*, 90 Fed. (2d) 556).

We submit that this Court has already passed upon this question. In the case of *International News Service* v. *Associated Press*, 248 U. S. 215, this Court restrained the piracy of news matter as an unfair method of competition. The Court, in its denunciation of the piracy, stressed the fact that the novelty and freshness of the news matter involved was a most important element in the success of the business, and it decried the practice of allowing one competitor in trade to receive a "free ride", so to speak, from the expenditure of time and money by another competitor. The Court pointed out "In doing this, the defendant, by his acts * * * is taking material that has been acquired by complainant as the result of * * * expenditure of money, labor and skill and which is saleable for money, and the defendant in appropriating it and selling it as his own is endeavoring to reap where he has not sown". Accordingly, an injunction directed against the piracy was affirmed.

The same views have been expressed by the Circuit Court for the First Circuit in *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc., et al.*, 90 Fed. (2d) 556. The Court below has, however, a diametrically opposite point of view.

It is also noteworthy that the Courts of New York State have reached the same conclusion as was reached by the First Circuit in *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc., et al.*, 90 Fed. (2d) 556, and by this Court in *International News Service* v. *Associated Press*, 248 U. S. 215. These decisions were rendered both under the New York State Anti-Trust Act, namely the Donnelly Act (N. Y. Gen'l Bus. Law, Sec. 340), *Wolfenstein* v. *Fashion Originators' Guild*, 244 App. Div. 656 (1st Dept.,

1935), and as a matter of ordinary equity practice. *Dutton & Co.* v. *Cupples,* 117 App. Div. 172 (1st Dept. 1907).*

II.

The plan adopted by the Guild is not monopolistic nor does it constitute an undue restraint upon trade.

This case presents no factor of price fixing or price control. As a matter of fact, it has been agreed that the petitioners are in active competition with each other and with other firms in the same line of business (R. pp. 165-166).

Despite the clarity of the stipulation in this regard, the Court below has made the following speculation: "It is safe to say that the members of the Guild instituted their anti-piracy campaign to protect their markets and price levels as well as to improve business morals within the industry". The Court below based this speculation upon an unresponsive remark of a witness who was not only hostile to the Guild, but whose testimony was specifically excluded, by agreement, from the record as against petitioners. This is shown not only by the preamble to the stipulation (R. p. 162, fol. 486), but also by the statement of the attorney for the Commission which reads as follows (R. pp. 177-178):

> "Mr. Hogg: Right now I will say that there will be no further testimony introduced against these Respondents that are entering into this stipulation. However, I propose to introduce evidence directed toward and against these other Respondents that have not entered into this stipulation, namely, Henri

* The conflict with the decisions of this Court, the Circuit Court of Appeals First Circuit and the New York courts is made abundantly clear by excerpts from the case note in XX Boston Law Review page 365 which are quoted in the appendix to this brief.

Bendel, Inc.; Lily Dache, Inc.; Peggy Hoyt, Inc.; and La Mode Chez Tappe, Inc."

The remark in question was made by an officer of Peggy Hoyt, Inc. after counsel for the Commission had thus concluded his case against petitioners.

Thus, the petitioners now before the Court, all of whom entered into the stipulation, were not called upon nor did they even have an opportunity to offer evidence in rebuttal.

It is noteworthy that when the plan of Fashion Originators' Guild (which is the same except for the composition of the arbitration committee) was before the Circuit Court of Appeals, First Circuit, that Court held, after a full hearing, that not only was there no element of price control but the elimination of style piracy would tend to decrease the price of hats. This, the Court stated, was because copying reduces the number of reorders from the original creators and thereby prevents them from buying materials in as large quantities as they otherwise would, *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc., et al.*, 90 Fed (2d) 556, 558.

It should also be noted in passing, that this Court has repeatedly held that the mere fact that "the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that co-operative endeavor to correct them necessarily constitutes an unreasonable restraint of trade." *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 374. The above statement of this Court has been cited with approval in *Sugar Institute* v. *U. S.*, 297 U. S. 553, 598; and *U. S.* v. *Socony Vacuum Oil Co.*, 60 Sup. Ct. 811, 840, 84 L. E. 760, 791 (May 6, 1940).

The fact remains that irrespective of which Circuit Court of Appeals is correct in its speculation as to the possible effect upon price, there is no justification for reading any

subversive purposes into the plan of the business competitors who are here before the Court. These men were not controlling prices. They were merely a group of business competitors who sought to protect themselves from parasites who seek to profit from the effort, expense and skill of those who create what they sell. As has been pointed out by this Court under the dissimilar facts of *Apex Hosiery* v. *U. S.*, 60 Sup. Ct. 982, 84 Law Ed. 913 (May 27, 1940), it is evident that the anti-trust acts were never intended to cover such a situation as this.

There is no factor of production control present in this case and none has been found to exist. There is nothing in the plan of the Guild to prevent any manufacturer from creating his own designs at his own risk and expense, and any manufacturer who desires to do so can obtain protection irrespective of membership in the Guild (R. p. 148).

Far from injuring the quality of the merchandise, the plan encourages better quality, for it is a well known fact that style is the principal element of ladies' hats (R. p. 167) and that copying such style in inferior grades of merchandise ruins the style of the hat from the point of view of the buyer.

It is thus apparent that none of the abuses which the anti-trust acts were designed to prevent, as outlined by this Court (See *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 52), are present in this case.

Finally, we point out that mere numbers or the extent of production of those engaged in a co-operative endeavor do not render the endeavor illegal. *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 374. The number of firms engaged and their production appears to be very small, however. (Yale Law Journal May, 1940 page 1290).

Conclusion.

By reason of the foregoing, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that petitioners may have the relief to which they are entitled, and also so that there may be a final determination of the conflict between the decision below and that of the Circuit Court of Appeals, First Circuit, in *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild of America, Inc., et al.*, 90 Fed. (2d) 556, and this Court in *International News* v. *Assoc. Press*, 248 U. S. 215; and to that end writ of certiorari should be granted and this Court should review the decision of said Circuit Court of Appeals for the Second Circuit and finally reverse it.

Respectfully submitted,

Counsel for Petitioners.

APPENDIX.

Excerpts from case note XX Boston Law Review 365.

"To prevent this design stealing in their industry a group of dress manufacturers created a guild. Original designs were registered, and the members agreed to sell to no store purchasing a stolen design from anyone. They accordingly refused to sell to a large department store. In a suit by this retailer to compel the guild to sell to it the bill was dismissed and the guild and its purpose approved by the Circuit Court of Appeals for the First Circuit. The organization was held not to violate the Sherman Anti-Trust Act,[1] the court saying: 'The Act doesn't preclude the members of an industry in which there are evils disorganizing trade from acting collectively in the elimination of such evils and establishing fair competitive practices.'[2]

A few years previously the New York State courts had upheld this same organization and its practices under the New York Anti-Trust Laws.[3] The court there said: 'The members of these associations had a right to co-operate for the purpose of correcting abuses or to stabilize the industry, provided their endeavor did not amount to an unlawful boycott or constitute an unreasonable restraint of trade. Here there was no intent or power to regulate prices nor even to control production.'[4]

The way thus seemed clear for the various industries to "clean house" and to eliminate practices which the majority of the manufacturers consider abusive and detrimental.

The decision in Millinery Creators' Guild v. Federal Trade Commission (109 F. [2d], 175 [C. C. A., 2d], however,

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[1] 15 U. S. C. A., secs. 1, 2.

[2] *Filene's Sons Co.* v. *Fashion Originator's Guild*, 90 F. (2d), 556 (C. C. A., 1) (1937).

[3] Donnelly Act; General Business Law, Sec. 340.

[4] *Wolfenstein* v. *F. O. G. of Am., Inc.*, 244 App. Div. 656, 280 N. Y. S. 361 (1935).

creates a disturbing element. To cure this same style piracy existing in the millinery trade a substantial group of manufacturers created their own guild and adopted the same measures as had their brethren in the dress industry. But the Federal Trade Commission issued an order commanding them to desist from such acts, branding them as unfair methods of competition. In upholding this order the court called style piracy 'an "evil" which the law nevertheless recognizes to be a socially desirable form of competition.'"

* * * * * * * * * * *

"The court in Millinery Creators' Guild v. Federal Trade Commission (109 F. [2d], 175) [discussed in Part One of this note, printed Saturday] proceeded on the theory that to prevent one from stealing a style or design amounted to the creating of a monopoly in the originator. But is this so? A monopoly, it seems, embraces the idea of concentration of *business* in the hands of a few. This doesn't mean that the whole of a trade must be controlled, but it may refer also to domination of part of a trade.[5] Could this be taken to include the situation where there are perhaps a thousand different designs of hats in the market at one time, where any individual may present his own design of the same fabric, made by the same machines, by no exclusive process? Can it be said that to grant the originator of one of these designs the exclusive use of it would be giving him any control over the market? Has he any semblance of domination over the millinery industry in respect to either price or production?

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[5] *American Biscuit Co.* v. *Klotz*, 44 F., 721 (1891); *In re Greene*, 52 F., 104 (1892); *National Fireproofing Co.* v. *Mason Builders' Ass'n*, 169 F., 259 (1909); *United States* v. *Keystone Watch Case Co.*, 218 F., 502 (1915).

The court claimed style piracy to be socially beneficial in that it cut prices and made available to the lowest purchasing classes the latest styles. But there is nothing to prevent the manufacturer of lower priced goods from creating his own designs except the desire to let someone else bear the expense and risk. If he were willing to work at it he would be as apt to create a "fancy catching" design as is the manufacturer of higher priced goods. The difference in price is caused by the quality and the workmanship and not by the style."

* * * * * * * * * *

"The court in the Cheney Bros. case [6] saw fit to restrict this decision" (International News Service v. Assoc. Press, 248 U. S. 215) "to its facts, and this view was followed in the instant case. But the fact remains that the Supreme Court has shown its aversion to piracy and has expressed the opinion that it is an undesirable practice. Nevertheless, the court in the instant case said that a combination to eliminate this practice is an unfair method of competition. This would be an unimpeachable conclusion if the practice indulged in were found, as it was by this circuit court, to be a desirable one. But if the opinion expressed in the International News Service case,[7] regardless of the decision, is followed it would seem that the court erred in the instant case."

* * * * * * * * * *

"Law is of necessity closely interwoven with social and economic aspects. As ideas and policies change so must eventually the law. It therefore becomes most interesting and pertinent when two courts of equal calibre view and examine the same business practice and attribute to it diametrically opposite social values and economic worth. The Supreme Court must eventually say which judged correctly."

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[6] 35 F. (2d), 279 (1929).
[7] 248 U. S., 215, 39 S. Ct., 68, 63 L. Ed., 211 (1914).